

**IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH,
MUMBAI**

**BEFORE MS KAVITHA RAJAGOPAL, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No. 790/MUM/2024
(A.Y. 2014-15)**

Gemological Research (Thailand) Co. Ltd. 933, Mitrotown Ofce Tower, 19 th Floor, unit 1903-1910, Rama IV Road, Wang Mai Pathum, Bangkok, Thailand-10330	v/s. बनाम	ACIT(International Taxation) 2(3)(2), Mumbai 17 th Floor, Air India Building, Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCG7850L		
Appellant/अपीलार्थी	..	Respondent/प्रतिवादी

Appellant by :	Shri J. D. Mistry
Respondent by :	Smt. Shailja Rai

Date of Hearing	13.06.2024
Date of Pronouncement	09.09.2024

आदेश / ORDER

PER RENU JAUHRI [A.M.] :-

This appeal is against the final assessment order u/s 147 r.w.s. 144C (13) of the Income-tax Act, 1961 [hereinafter referred to as "Act"] dated 12.01.2024 passed by the Assistant Commissioner of Income-tax (International Tax) Circle 2(3)(2), Mumbai [AO] in pursuance to the directions of the Dispute Resolution Panel, Mumbai-1 [DRP] dated 27.12.2023 for Assessment Year [A.Y.] 2018-19.

2. The assessee has raised following grounds of appeal:



“1:0 Re: Validity of re-assessment proceedings:

1:1 The Assessing Officer / the Dispute Resolution Panel has erred in re-opening the Appellant's assessment u/s. 148 of the Income-tax Act, 1961 ("Act").

1:2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject the re-opening u/s. 148 of the Act was in excess of jurisdiction and is also otherwise bad in law.

1:3 The Appellant submits that the proceedings u/s. 148 of the Act were not in accordance with law and consequently ought to be struck down.

Without prejudice to the foregoing:

2:0 Re.: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India::

2:1 The Assessing Officer/the Dispute Resolution Panel has erred in holding that the Appellant has a 'Permanent Establishment' ("PE") in India.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

2:3 The Appellant submits that the Assessing Officer/the Dispute Resolution Panel has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

2:4 The Appellant submits that the Assessing Officer/the Dispute Resolution Panel's stand that the Appellant has a PE in India be struck down.

Without prejudice to the foregoing:

3:0 Re.: Attribution:

3:1 The Assessing Officer/the Dispute Resolution Panel has erred in holding that 50% of the receipts are attributable to the alleged PE of the Appellant in India.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject no part whatsoever of its receipts are attributable to the alleged PE of the Appellant in India and the stand taken by the Assessing Officer/the Dispute Resolution



Panel in this regard is incorrect, illegal, arbitrary, not in accordance with law and hence ought to be struck down.

3:3 The Appellant submits that the arbitrary action of the Assessing Officer/the Dispute Resolution Panel be struck down and the Assessing Officer be directed to accept the total Income as returned.

Without prejudice to the foregoing:

4:0 Re.: Estimation of gross profit:

4:1 The Assessing Officer/the Dispute Resolution Panel has erred in holding that the 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.

4:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PE has been remunerated at an arm's length and hence the stand taken by the Assessing Officer/the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

4:3 The Appellant submits that the Assessing Officer be directed to accept the total income as returned.

5:0 Re.: General:

The Assessing Officer / the Dispute Resolution Panel have erred in assessing the total income of the Appellant at Rs. 2,46,80,065/- against the returned income of Rs. Nil thereby determining a demand of Rs. 1,76,31,600/- against the refund claimed of Rs. NIL/- while returning the income for the year.”

3. Brief facts of the case are that the assessee company is a group company of Gemological Institute of America, USA, having a subsidiary M/s. GIA India Laboratory Pvt Ltd. in India. The assessee has filed his return declaring nil income on 30.11.2018. Thereafter, the case was reopened u/s 148, as the assessee had earned total business receipts of Rs. 24,30,33,620/-, out of which 50% was held to be attributable to the assessee's PE in India. After applying the profit ratio of 20.31%, the amount of Rs. 2,46,80,065/- was held to be total

business income chargeable to tax. The final assessment was made at an income of Rs. 2,46,80,065/-, pursuant to the directions of the Hon'ble DRP.

4. We have heard the rival submissions. At the outset, it was pointed out by the Ld. AR that the facts and issues involved on this case are identical as in the case of M/s. Gemological Institute of America Inc.

5. The first ground relates to validity of reassessment proceedings. Ld. AR has submitted that this ground is not being pressed at this point of time. Accordingly, this ground is being left open.

6. Ground No. 2, 3 & 4 : Ground No. 2 relates to holding that the assessee has a permanent establishment [P.E.] in India, ground No. 3 relates to the question of attribution of profits whereas ground No. 4 relates estimation of gross profit attributable to the assessee.

6.1 It has been pointed out by the Ld. AR that these issues are covered by the order of the co-ordinate benches in assessee's own case, in the order for AY 2010-11 to AY 2016-17 as well as by the order **in ITA No. 978/Mum/2021 for AY 2017-18**. Ld. DR has fairly conceded that the PE issue stands decided in favour of the assessee and is covered by the earlier years' orders of the co-ordinate benches. Relevant portion of the order in the immediately preceding year i.e. AY 2017-18 is reproduced below:

4. The ground No.1 raised by the assessee is with regard to existence of Permanent Establishment (PE) in India. All other grounds raised by the assessee vide ground Nos.2-3 revolves on the existence of PE in India.



Hence, we take up the central issue as to whether the assessee has a PE in India.

4.1 We have heard rival submissions and perused the materials available on record. The entire grounds raised by the assessee are covered by the Co-ordinate Bench decision of this Tribunal in assessee's own case in ITA Nos. 2309/Mum/2017, 1136/Mum/2015, 2295/Mum/2017, 7040/Mum/2017, 6380/Mum/2018 & 7741/Mum/2019 for AYrs. 2010-11 to 2016-17 dated 03/05/2021. The operative portion of the said order is hereby reproduced hereunder for the sake of convenience: -

2. "Shri J.D. Mistry, Sr. Advocate appearing on behalf of the assessee submitted that in all these bench of appeals the assessee has raised identical grounds, except for the appeal for assessment year 2010-11 wherein the assessee has inter-alia challenged validity of reassessment and other grounds consequential to the addition made. The Id. Counsel for the assessee submitted that the primary issue assailed in all the appeals by the assessee is that the Assessing Officer and the Dispute Resolution Panel have erred in holding that the assessee is having 'Permanent Establishment' (PE) in India. If this issue is decided in favour of the assessee, the other alternate grounds viz. Attribution of Profit and Estimation of Gross Profit, raised without prejudice to the primary ground would become academic.

Sh. Mistry submitted that the assessee/appellant is a group company of Gemmological Institute of America Inc., USA (in short 'GLA-US'). In the case of GIA- US, the Assessing Officer held that GIA India Laboratory Private Ltd. (a subsidiary of ('GLA-US') is PE of the said company in India. The Tribunal in the case of Gemmological Institute of America Inc. vs. Addl.CIT, in ITA No.1138/Mum/2015 for assessment year 2010-11 decided on 21/06/2019 after examining the facts of the case and Article -5 of India USDTAA held, that GLA-US is not having any PE or agency PE in India. The Id. Counsel for the assessee asserted that the facts and the nature of transaction in the present case are identical. The Assessing Officer while passing the draft assessment order has ditto the assessment order in the case of GLA-US for AY 2011-12. The Assessing Officer has verbatim adopted the findings of assessment order for AY 2011-12 in the case of GIA-US. The Id. Counsel further pointed that the Dispute Resolution Panel (DRP) has also observed that the facts in the case of assessee and that of GLA-US are similar. Now, that it is an established position that the facts in the case of assessee and GLA-US are similar, the case of



assessee is squarely covered by the order of Tribunal in the case of GIA-US in ITA 1138/Mum/2015 (supra). Therefore, the assessment order is liable to set aside on the sole ground that the assessee is not having any PE in India.

The Id. Counsel for the assessee contended that if ground No.2 of appeal i.e. Whether the assessee is having PE in India, is decided in favour of the assessee, there would be no need to decide ground No.1 challenging validity of reassessment proceedings. Even the other grounds in appeal assailing attribution and estimation of gross profit, raised without prejudice to primary ground would become academic.

3. Shri Sanjay Singh representing the Department vehemently defended the impugned order. However, the Id. Departmental Representative fairly admitted that the main ground in the present set of appeals viz. appellant having PE in India has been adjudicated by the Tribunal in the case of Gemmological Institute of America Inc. vs. Addl. CIT (supra), a group concern of the assessee.

4. We have heard the submissions of rival sides and have examined the orders of authorities below. The appellant/assessee is incorporated in Thailand and is providing gem grading services. The assessee/appellant is a group concern of GLA-US. During the period relevant to the assessment year under appeal the assessee has rendered diamond grading services to its Associated Enterprise (AE) in India i.e. GIA India Laboratories Pvt. Ltd. During the course of assessment proceedings the Assessing Officer formed an opinion that the assessee's AE i.e. GIA India Lab. Pvt. Ltd. has all essential components of having PE of the assessee. We observe that in holding Indian AE as PE of the assessee, the Assessing Officer has placed extensive reliance on the assessment order for AY 2011-12 in the case of GLA-US. The Assessing Officer in draft assessment order has verbatim quoted afore said assessment order. In fact, the Assessing Officer has not given independent findings and has merely adopted the findings given in the assessment order for AY 2011-12 in the case of GIA- US stating similarity of facts.

5. We find that the DRP in para 3.3 of the Directions has reiterated the fact that the assessee's case and that of GIA-US were found to be very similar. The DRP followed the Directions of DRP in assessee's case for AY 2011-12 and 2012-13. We observe that in AY 2011-12 and 2012-13, the Assessing Officer has again relied on the assessment order for AY 2011-12 in the case of GLA-US. The DRP after considering the provisions of Article 5 of India Thailand DTAA upheld the findings of



Assessing Officer in draft assessment order. In the impugned assessment year, the DRP on the basis of findings by DRP in AY 2011-12 and 2012-13 has rejected objections of the assessee and confirmed the addition proposed in draft assessment order. In other words, in the case of present assessee no independent observations and findings have been recorded either by the Assessing Officer or by the DRP. The basis for holding Indian AE as PE of the assessee is the assessment order for AY 2011-12 in the case of GIA-US.

6. The Co-ordinate Bench of Tribunal in the case of Gemmological Institute of America Inc. vs. Additional CIT(supra), after threadbare examining business model of the assessee and the provision of Article - 5 of India-US DTAA held that GIA India Lab.Pvt. Ltd. is not PE of GIA-US in India. For the sake of completeness relevant extract of the findings of Tribunal are reproduced herein under:-

"9. We have carefully considered the rival submissions, perused the relevant material, including the orders of the lower authorities as well as the case laws referred at the time of hearing. Notably, the controversy before us primarily revolves around as to whether or not the subsidiary of the assessee company i.e., GIA India Lab can be construed as its PE in India. The income-tax authorities have invoked section 9 of the Act and/or Article 5 of the India-US Treaty in order to say that the assessee company has a PE in India. On the contrary, as per the assessee, the impugned receipts are in the nature of business profits, and in the absence of any PE in India, the same are not taxable in India. Factually speaking, it is evident that the on perusal of the agreements, the transaction of grading services between assessee company and GIA India Lab cannot be considered to be in the nature of a joint venture, since GIA India Lab has its own independent expertise but only due to its technology/capacity constraints, it forwards the stones to the assessee company for grading purposes; it is not an arrangement between two parties where each party contributes its share in order to undertake an economic activity which is subjected to joint control; in fact, the arrangement is akin to an assignment or sub-contracting of grading services to the assessee company, wherever GIA India Lab does not have the requisite expertise or technology or capacity for carrying out the grading services; further, the aforesaid arrangement has also been accepted as a mere rendering of grading services by the Transfer Pricing Officer both



in the case of GIA India Lab and the assessee company. In this background, we may now proceed to decide as to whether the Indian Subsidiary GIA India Lab can be construed as a PE under any of the aspects contained in Article 5 of India-USA DTAA.

10. Firstly, we may examine whether GIA India Ltd. can be constituted as a fixed place PE of the assessee in terms of Article 5(1) of the India- USA DTAA. As per Article 5(1) of the Indo-USA DTAA, a fixed place PE arises when the foreign entity has a fixed place in India through which its business is wholly or partly carried on. In this context, the learned Counsel pointed out that a similar situation has been considered by the Hon'ble High Court of Delhi in the case of EFunds IT Solutions (supra), which has been upheld by the Hon'ble Supreme Court. In that case, it has been held that a subsidiary cannot be regarded as a 'fixed place PE' of the parent company on the ground of a close association between the Indian subsidiary and the foreign taxpayer. In that case, it was noted that because various services were being provided by E-Fund India (Indian subsidiary) to the taxpayer or that the foreign tax payer was dependent upon Indian subsidiary (eFund India) for its earnings or assignment or sub-contract of contracts to e-Fund India or e-Fund India being reimbursed on a certain cost plus basis or saving / reduction in cost by transferring business or back office operations to the Indian subsidiary or the manner and mode of the payment of royalty transactions or e-Fund India providing support for carrying on core activities being performed by the taxpayer or associated transactions, cannot be the basis to construe the Indian subsidiary as PE of the foreign tax payer. Further, before the Hon'ble Delhi High Court, the Department had contended that the foreign company had a joint venture or partnership with Indian subsidiary as the businesses of the assessee company and the Indian subsidiary were inter-linked and closely connected (which is also contended in the case of the assessee before us) and therefore the Indian subsidiary was regarded as PE of foreign company in India. The aforesaid argument of the Revenue was repelled since the conditions under Article 5 of the DTAA were not met and it has been held that PE cannot be established merely because of transactions between associated enterprises or the principal sub-contracting or assigning the contract to the subsidiary.



11. *Factually, in the case of the assessee company, there is no joint venture arrangement between the assessee company and GIA India Lab vis-à-vis gem grading services rendered by the assessee company to GIA India Lab since it is GIA India Lab who enters into agreement with the client and bears all the risks including credit risks, client facing risks, etc. Also, in terms of the agreement, GIA India Lab bears the risk of loss or damage to articles while in transit to and from the assessee company and also during the time when the articles are at or in the assessee company's facilities. Therefore, the economic risks of the gem grading services rendered by the assessee company vis-à-vis stones/diamonds of customers of GIA India Lab shipped to it are borne by GIA India Lab and hence, there is no joint venture arrangement whatsoever between the assessee company and GIA India Lab. In terms of Article 5(6) of the India USA DTAA, it is provided that the mere fact that a company has controlling interest in the other company does not by itself construe the other company to be its PE. Accordingly, the assessee company is not having a 'fixed place' PE in India.*

12. *In terms of Article 5 (1) of the India - USA DTAA, a service PE arises on the furnishing of services in India by the assessee company through employees or other personnel, but only if: activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. Hence, a service PE is triggered if the services (other than included services as defined in Article 12 'Royalties and Fees for Included Services') are rendered by the assessee company through employees or other personnel and activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. The assessee company renders 'grading services' and 'management services to GIA India Lab'. In fact, 2 graders who were earlier employed with the assessee company are now employed with GIA India Lab and are on the payrolls of GIA India Lab and are working under control and supervisions of GIA India Lab and therefore, no service PE is created in India in terms of India- US DTAA. The Supreme Court has affirmed the decision of the Delhi High Court in EFunds (supra) wherein it has been held that two employees*

deputed to e-Fund India fund India did not create a service PE as the entire salary cost was borne by e-fund India and they were working under control and supervision of e-fund India. In the facts of the instant case, since the said services are rendered outside India and none of the employees/ personnel of the assessee company has visited India and therefore, service PE is not triggered in the case of the assessee company.

13. In terms of Article 5(4) of the India-US/DTAA, an agency PE is created where a person-other than an agent of an independent status to whom paragraph 5 applies - is acting in India on behalf of an enterprise of the USA, that enterprise shall be deemed to have a permanent establishment in India, if:

(a) he has and habitually exercises in India an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;

(b) he has no such authority but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or (c) he habitually secures orders in India wholly or almost wholly for the enterprise.

14. The definition excludes from the ambit of a PE any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status acts in the ordinary course of its business. The OECD Commentary deals with the concept of 'Independent Agent' in paragraphs 36 to 39. In terms of paragraph 37 of the OECD Commentary, a person will be regarded as an independent agent (i.e. it will not constitute a PE of the enterprise on whose behalf it acts) only if:

-He is independent of the enterprise both legally and economically, and

-He acts in the ordinary course of his business when acting on behalf of the enterprise.

In other words, Article 5(5) of the India- USA DTAA stipulates the following conditions which are required to be satisfied in order that an agent may be said to be an independent agent, i.e.,

-That he should be an agent of independent status; that, he should be acting in the ordinary course of his business; and, that his activities should not be devoted wholly or almost wholly on behalf of the foreign enterprise for whom he is acting as agent.

15. GIA India Lab is an independent/separate legal entity in India which is engaged in rendering of grading services. Further, considering the functions and the risks assumed by GIA India Lab vis-à-vis its business activities in India (as has been recorded in the transfer pricing study report which functional and risk analysis has been accepted by the Transfer Pricing Officer both in the case of GLA India Lab and in the case of the assessee company), GIA India Lab is an independent entity which is rendering grading services to its clients in India. GIA India Lab also bears service risk and all client facing risks vis-à-vis the stones sent to the assessee company for grading purposes (as has been recorded in the Transfer Pricing Study Report). Hence, GIA India Lab is not acting in India on behalf of the assessee company. Further, GIA India Lab is not having any authority to conclude contracts and has neither concluded any contracts on behalf of the assessee company nor has it secured any orders for the assessee company in India. Thus, GIA India Lab cannot be regarded as 'agency PE' of the assessee company in India."

[Emphasised by us]

7. We find that Article -5 of India-US DTAA and Article -5 of India - Thailand DTAA have almost similar clause. Both sides are unanimous in stating that the nature of transactions and terms and conditions of transactions between assessee and Indian AE in both the cases are similar. The Revenue has not brought on record any distinguishing factor in the present set of appeals before us. Therefore, the findings given by the Co- ordinate Bench of Tribunal while adjudicating the appeal in the case of assessee's group concern GIA-US would mutatis mutandis apply to present appeal. Respectfully following the order of Co-ordinate Bench, we hold that GLA India Laboratories Pvt. Ltd. is not agency PE/PE of the assessee. Consequently, ground No.2 of the appeal is decided in favour of the assessee.



9. In ground of appeal No. 3, the assessee has assailed attribution to the alleged PE in India. Since, the assessee has succeeded on the primary issue, the alternate ground has become academic, therefore, not deliberated upon.

10. In ground of appeal No. 4, the assessee has assailed estimation of gross profits. Since, the assessee has succeeded on the primary issue, this ground has become academic, therefore, not deliberated upon.”

7. Respectfully following the decision of the co-ordinate benches in the earlier assessment years, we hold that the assessee does not have a PE in India. Accordingly, Ground Nos. 2, 3 and 4 are decided in favour of the assessee.

8. In the result, the appeal of the assessee allowed.

Order pronounced in the open court on 09.09.2024.

Sd/-

KAVITHA RAJAGOPAL

(न्यायिक सदस्य/JUDICIAL MEMBER)

Sd/-

RENU JAUHRI

(लेखाकार सदस्य/ACCOUNTANT MEMBER)

Place: मुंबई/Mumbai

दिनांक /Date 09.09.2024

अनिकेत सिंह राजपूत/ स्टेनो

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
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ITA No. 790/Mum/2024
A.Y. 2014-15.
Gemological Research (Thailand) Co. Ltd.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.